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No. 90-1918

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KRAFT GENERAL FOODS, INC.
(formerly Kraft, Inc.),
Petitioner,

v.

IOWA DEPARTMENT OF REVENUE AND FINANCE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
INTRODUCTORY STATEMENT	1
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE APPLICATION OF THE NONDISCRIMINATION PRONG OF THE *COMPLETE AUTO* TEST IN THE CONTEXT OF THE FOREIGN COMMERCE CLAUSE HAS NOT BEEN ADDRESSED BY THIS COURT	4
II. THIS ISSUE AFFECTS THE VAST MAJORITY OF MULTISTATE AND MULTINATIONAL CORPORATE TAXPAYERS	6
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page
Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977)	8
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)	4
Container Corp. v. Franchise Tax Board, 463 U.S. 159 (1983)	4
Cook v. Pennsylvania, 97 U.S. 566 (1878)	3, 5
Hale v. Bimco, 306 U.S. 375 (1939)	3, 5
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	4
Kraft, Inc. v. Iowa Department of Revenue and Finance, 465 N.W.2d 664 (Iowa 1991)	4
Miller v. Publicker Industries, Inc., 457 So.2d 1374 (Fla. 1984)	6
Mobil Oil Corporation v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980)	4
Wardair Canada Inc. v. Florida Department of Revenue, 477 U.S. 1 (1986)	4
Westinghouse v. Tully, 466 U.S. 388 (1984)	8
Codes and Statutes	
Colorado Rev. Stat. §§ 39-22-303(10); 39-22-304	7
Kansas Stat. Ann. § 79-32, 138(c) (vi)	7
Maine Rev. Stat. Ann. § 5200-A2.G	7
Missouri Ann. Stat. § 143.431	7
New Mexico Stat. Ann. § 7-4-2	6
Oklahoma Stat. Ann. § 2358(A) (4) (b)	6
Rhode Island Gen. Laws §§ 44-11-11(a); 44-11-12	6
South Carolina Code Ann. §§ 12-7-415; 12-7-1120 (2)	6
Vermont Stat. Ann. § 5811(18)	6

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIE* IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as amicus curiae in support of petitioner in the above-captioned case. Written consents of the Petitioner and the Respondent have been obtained and have been filed with this Court.

INTEREST OF *AMICUS CURIAE*

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of commerce. The Committee on State Taxation (COST), an advisory committee of the Council, consists of 357 cor-

porate members, engaged in interstate and international business. COST's objective is to preserve and promote equitable and non-discriminatory state and local taxation of multijurisdictional business entities.

The Iowa tax system discriminatorily imposes a tax on dividends received from corporations incorporated and doing business in a foreign country while exempting the dividends received from corporations incorporated under the laws of one of the United States. Similar tax schemes are imposed in other states.

The majority of COST member companies are engaged in business in jurisdictions outside the United States through foreign subsidiaries. Thus, COST has a great interest in the present case, which challenges the imposition of a discriminatory tax on corporations doing business in foreign countries in violation of the foreign commerce clause.

SUMMARY OF ARGUMENT

Under the Iowa tax scheme, dividends from domestic subsidiaries (corporations incorporated under the laws of Iowa or any other of the United States) are excluded from the tax base, in whole or in part, but dividends received from foreign subsidiaries (corporations incorporated under the laws of a non-United States jurisdiction and doing business in non-U.S. jurisdictions) are included in the tax base. In other words, the State has given preferential treatment to domestic commerce over foreign commerce. The Iowa Supreme Court, in analyzing whether this tax scheme violated the foreign commerce clause, applied the incorrect test. In determining whether Iowa's taxation of foreign subsidiary dividends discriminated against foreign commerce, the court did not compare the treatment of foreign commerce with domestic commerce. Rather, the court incorrectly compared foreign commerce with intrastate commerce.

This Court has not had an opportunity to determine whether impermissible discrimination exists in the context of a foreign commerce clause challenge since the modern trend of commerce clause analysis has been developed. However, it is clear that in determining whether a tax discriminates against foreign commerce the appropriate issue to be resolved is whether the tax discriminates between foreign commerce and commerce within the United States. *Hale v. Bimco*, 306 U.S. 375 (1939); *Cook v. Pennsylvania*, 97 U.S. 566 (1878).

The issue of whether discriminatory state tax treatment of foreign subsidiary dividends violates the foreign commerce clause has wide impact. Ten jurisdictions currently include all or part of the dividends received from foreign subsidiaries in their tax base while excluding dividends received from domestic subsidiaries from the tax base. United States corporations engaged in business in foreign jurisdictions typically do so through foreign subsidiaries. Thus, these companies are subject to the same kind of discrimination as that suffered by Kraft in this case. Hence, the issue in this case has impact beyond the particular taxpayer in this case and the particular taxing jurisdiction involved. Therefore, guidance from this Court is important. It is clearly necessary for this Court to expressly address whether a state's tax preference of interstate commerce over foreign commerce violates the foreign commerce clause.

ARGUMENT

I. THE APPLICATION OF THE NONDISCRIMINATION PRONG OF THE *COMPLETE AUTO* TEST IN THE CONTEXT OF THE FOREIGN COMMERCE CLAUSE HAS NOT BEEN ADDRESSED BY THIS COURT

The issue in this case is whether a State tax that facially discriminates in favor of domestic commerce over foreign commerce violates the dormant foreign commerce clause because it fails to satisfy the nondiscrimination prong of the four-part test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). This four part test is the initial test to be applied in a foreign commerce clause case. *Wardair Canada Inc. v. Florida Department of Revenue*, 477 U.S. 1, 8 (1986), *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445-446 (1979). In this case, the discrimination takes the form of the inclusion of foreign subsidiary dividends in the tax base while excluding from the tax base dividends paid by United States subsidiaries.

This Court has not had the opportunity since it decided *Complete Auto* to apply that case's four prong test in a foreign commerce clause context. In the four foreign commerce tax cases decided since *Complete Auto, Wardair, Japan Line, Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983) and *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 455 U.S. 425 (1980) this Court had no occassion to discuss the application of the discrimination prong of the *Complete Auto* test, because the parties either conceded the absence of discrimination or did not raise the issue. Thus, no recent cases have considered the application of the nondiscrimination test in the context of foreign, as opposed to interstate, commerce. The Iowa Supreme Court itself noted that the application of the nondiscrimination test in the foreign commerce context is unclear. *Kraft, Inc. v. Iowa Department of Revenue and Finance*, 465 N.W.2d 664 (Iowa 1991).

However, this Court has, in pre-*Complete Auto* decisions, determined that the foreign commerce clause was violated by comparing the treatment of foreign commerce with the treatment of domestic commerce. The decision of the Iowa Supreme Court, which required a showing of an intrastate benefit is clearly inconsistent with the decisions of this Court.

In *Cook v. Pennsylvania*, 97 U.S. 566 (1878), this Court held that a tax scheme which imposed a tax on foreign goods sold at auction and exempted goods of American growth or manufacture violated the foreign commerce clause. This Court did not, in reaching its decision, ask whether Pennsylvania growers or manufacturers were benefited to the exclusion of those from other states. Had it applied a "local benefit" test, as applied by the Iowa Supreme Court, no unconstitutional discrimination would have been found since, like the Iowa statute, all domestic United States commerce is treated equally. Rather, this Court simply looked at whether foreign commerce was disfavored when compared with domestic commerce, stating "[i]f a tax assessed by a State injuriously discriminating against the products of a State of the Union is forbidden by the Constitution, a *similar tax against goods imported from a foreign State is equally forbidden.*" *Id.* at 573 (emphasis added).

In *Hale v. Bimco*, 306 U.S. 375 (1939), this Court addressed the constitutionality, under the foreign commerce clause, of a Florida statute that imposed an inspection fee only on cement from sources outside the United States. As in *Cook*, this Court held that this facial discrimination between foreign commerce and interstate commerce violated the foreign commerce clause.

This Court has never suggested that the four-prong test set forth in *Complete Auto* supersedes or in any way changes the analysis applied in *Cook* and *Hale*. Rather, these cases must be read together with and consistently with *Complete Auto*. Such a reading clearly shows that, in the context of the foreign commerce clause, the dis-

crimination analysis requires a comparison of foreign commerce with domestic commerce. The Iowa Supreme Court failed to apply this analysis, and, therefore, its decision must be reversed.

Further, the Florida Supreme Court has taken a different view from that of the Iowa Supreme Court in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), in which it held that a fuel tax exemption for gasohol containing agricultural products grown in the United States facially discriminated against foreign commerce. Thus, there are conflicting decisions in the state courts with regard to the correct standard to be applied and a taxpayer will face different results and disparate treatment depending on the state in which it does business. Review of the decision of the Iowa Supreme Court by this Court is, therefore, necessary to restore uniform application of the foreign commerce clause.

II. THIS ISSUE AFFECTS THE VAST MAJORITY OF MULTISTATE AND MULTINATIONAL CORPORATE TAXPAYERS

The issue in this case affects the large number of corporate taxpayers doing business in foreign jurisdictions through foreign subsidiaries. Further, Iowa is not alone in its facial discrimination against foreign commerce through differing tax treatment of foreign subsidiary dividends than domestic subsidiary dividends.

The states of New Mexico [1], Vermont [2], Oklahoma [3], South Carolina [4] and Rhode Island [5] include foreign subsidiary dividends in their tax base while excluding domestic subsidiary dividends from their tax base. Four

[1] N.M. Stat. Ann. § 7-4-2

[2] Vt. Stat. Ann. § 5811(18)

[3] Okla. Stat. Ann. § 2358(A)(4)(b)

[4] S.C. Code Ann. §§ 12-7-415; 12-7-1120(2)

[5] R.I. Gen. Laws §§ 44-11-11(a); 44-11-12

other states allow a partial exclusion for foreign subsidiary dividends which is less than the exclusion allowed for domestic subsidiary dividends.[6] Thus, corporations face the discriminatory treatment and attendant competitive disadvantage in Iowa and other jurisdictions. Moreover, if the decision of the Iowa Supreme Court is not reversed, other states will undoubtedly consider including foreign subsidiary dividends in their tax bases as a means of increasing tax revenues through the exportation of tax burdens.

According to a survey of COST member companies, eighty-seven percent of the member companies do business in foreign jurisdictions through foreign subsidiaries. Seventy-two percent of the member companies receiving dividends from their foreign subsidiaries are required to file corporate income tax returns in Iowa. Approximately one-half of these companies report doing business in at least one of the other jurisdictions which includes foreign subsidiary dividends in the tax base while excluding all or part of domestic subsidiary dividends.[7]

Clearly, this case presents a question of general importance. The issue affects the validity of taxing schemes in jurisdictions other than Iowa. And, as the above figures show, the issue greatly impacts corporations engaged in multistate and multinational commerce.

It is important to note that corporations engaged in multinational business do so for a number of business reasons, including:

> the requirements of the local country, a better ability to limit their liability in that country, the marketing advantage of being perceived by customers as a local company, greater ease in repatriating funds, greater

[6] Colorado (Colo. Rev. Stat. §§ 39-22-303(10); 39-22-304); Kansas (Kan. Stat. Ann. § 79-32,138(c)(vi); Maine (Me. Rev. Stat. Ann. § 5200-A2.G); and Missouri (Mo. Ann. Stat. § 143.431).

[7] This information is taken from a June 1991 survey of COST member companies.

> ease in borrowing funds locally, and ability to own property and manufacture in that country.

Stipulation of the Parties, ¶ 10, App. 30a. Thus, the tax scheme imposed by Iowa and other states penalizes corporations for doing business in the most advantageous form, thereby foreclosing tax-neutral decisions in violation of the foreign commerce clause. *See, Westinghouse v. Tully*, 466 U.S. 388 (1984); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). The tax schemes imposed by such states affect decisions on where to incorporate and where to invest, encouraging capital investment in domestic over foreign subsidiaries. However, "[f]oreign commerce is preeminently a matter of national concern." *Japan Line*, *supra* at 448. Congress has been given the power to regulate foreign commerce. It is not for state legislatures to either encourage or discourage forms of domestic or foreign commerce through their tax systems.

CONCLUSION

For the foregoing reasons, the Committee on State Taxation of the Council of State Chambers of Commerce respectfully requests that Petitioner's Petition for Writ of Certiorari be granted.

Respectfully submitted,

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